FILE COPY

No. 3659

In the Supreme Court of the United States

OCTOBER TERM, 1956

THE UNITED STATES OF AMERICA, APPELLANT

v.

DUPONT FAMOUS FOODS, INC.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW JERSEY

STATEMENT AS TO JURISDICTION

In the District Court of the United States for the District of New Jersey

CRIMINAL NO. 7918–B

UNITED STATES OF AMERICA, PLAINTIFF

v.

DURKEE FAMOUS FOODS, INC., A CORPORATION, DEFENDANT

STATEMENT AS TO JURISDICTION

In compliance with Rule 12 of the Supreme Court of the United States, as amended, United States of America submits herewith its statement showing the basis of jurisdiction of the Supreme Court of the United States to entertain an appeal in this cause.

A. The statutory jurisdiction of the Supreme Court to review by direct appeal the judgment complained of is conferred by Title 18, Section 682, of the United States Code, otherwise known as the Criminal Appeals Act, and by Section 345, Title 28, of the United States Code.

B. The statute of the United States, the construction of which is involved herein is the Act of May 10, 1934, c. 278, 48 Stat. 772 (U. S. C. Title 18, Sec. 587) which provides so far as pertinent:

> Whenever an indictment is found defective or insufficient for any cause, after the period prescribed by the applicable statute

of limitations has expired, a new indictment may be returned at any time during the next succeeding term of court following such finding, during which a grand jury thereof shall be in session.

C. The judgment of the District Court sought to be reviewed was entered on June 28, 1938. The application for appeal was filed on July —, 1938, and the appeal was allowed on July —, 1938.

D. The indictment is in five separate counts, each of which is based on Section 1 of the Elkins Act, U. S. C. Title 49, Sec. 41 (1), and alleges that on August 17, 1932, the defendant knowingly solicited, accepted and received a concession of 2 cents per 100 pounds in respect of the interstate transportation of vegetable oil by certain specified common carriers by railroad, whereby the oil was transported at a less rate than that named in the carriers' published tariffs.

A prior indictment charging the same offenses had been returned at the April term of Court in 1934, to which a motion to quash was filed in April, 1935, and sustained by opinion filed January 14, 1937, and judgment entered February 2, 1937, during the January, 1937, term of Court.[1] At the

[1] Thus, almost three years had passed between the return of the indictment and the date on which it was quashed, and four and a half years between the commission of the offenses and the quashing of the indictment. But for the Act of May 10, 1934 (U. S. C., Title 18, Sec. 587) the statute of limitations (U. S. C., Title 18, Sec. 582) would have barred re-indictment.

same term the Government (invoking the Act of May 10, 1934, U. S. C. Title 18, Sec. 587) re-presented the case on March 16, 1937, to the grand jury empaneled for and in session during the January term at Trenton, New Jersey, and the grand jury returned a new indictment on April 9, 1937, at that term which had been extended by order of the Court. The next succeeding term of court for the District of New Jersey was fixed by law to be held beginning April 6, 1937 (the first Tuesday in April), at Newark, New Jersey (U. S. C. Title 28, Sec. 176).

To this new indictment of April 9, 1937, the defendant filed on June 18, 1937, a pleading designated as a "Plea in Bar," alleging (1) that as the offenses charged were committed more than three years preceding the return of the indictment, prosecution was barred by the statute of limitations (U. S. C. Title 18, Sec. 582); (2) that the indictment was not returned in conformity with the Act of May 10, 1934 (U. S. C. Title 18, Sec. 587), because it was returned at the same term and not at the term next succeeding the term at which the prior indictment was found defective; and (3) that the order quashing the prior indictment was appealable under the Criminal Appeals Act (U. S. C. Title 18, Sec. 682) and that, therefore, the Act of May 10, 1934, had no application to that order. The pleading concludes with the following:

> All of which said defendant, Durkee Famous Foods, Inc., is ready and willing to

> verify, and therefore pleads the same in bar of any prosecution or punishment under said indictment or any count thereof, and says that to prosecute or punish it thereunder for any of the alleged offenses charged therein is contrary to the provisions of the statute of limitations, 18 U. S. Code, section 582.
>
> WHEREFORE, the defendant prays judgment that the said alleged indictment be not further prosecuted against it, and that by this court it may be dismissed and discharged from the said premises without day and the said alleged indictment be held for nought and quashed.

On June 28, 1938, the court entered judgment ordering,

> that the said Plea in Bar to said indictment be and the same is hereby sustained, and that said indictment be not further prosecuted against said defendant, and that said indictment be and the same is hereby accordingly dismissed, discharged, held for nought and quashed.

Construing the Act of May 10, 1934, the court's opinion holds that the language of the Act,

> leads to the inescapable conclusion that where an indictment has been found to be defective after the passage of the prescribed period of limitation, the one and only Grand Jury which can hand down a new indictment is that Grand Jury which is authorized to act at the term next succeeding the term at which the Court found the indictment to

be defective; and it appearing, as it does here, that the indictments under review were not found by a Grand Jury authorized as aforesaid, the indictments must necessarily fall.

On the date this judgment was entered the "term next succeeding the term at which the Court found the (prior) indictment to be defective" had expired.

Although the Criminal Appeals Act provides for a direct appeal to the Supreme Court "From the decision or judgment sustaining a special plea in bar, when the defendant has not been put in jeopardy," the application of that provision to the judgment in this case is not entirely clear, because (1) it is uncertain whether the pleading sustained by the judgment is "a special plea in bar," the prayer thereof being, among other things, that the indictment be "held for nought and quashed," and the judgment being not only that the "Plea in Bar" be sustained but also that the indictment be "dismissed, discharged, held for nought and quashed," and (2) the ruling of the court is not of such nature as forever to bar prosecution of the offenses, but, instead, recognizes the right of the Government to prosecute further at the term of court next succeeding the term at which the Court found the prior indictment to be defective. (Compare *United States* v. *Thompson,* 251 U. S. 407, 412; *United States* v. *Storrs,* 272 U. S. 652.)

The right to appeal, however, is clear, we think under the language of the Act which provides for an appeal "From a decision or judgment quashing setting aside, or sustaining a demurrer to, any indictment, or any count thereof, where such decision or judgment is based upon the invalidity or construction of the statute upon which the indictment is founded."

It is true that the statute here construed (U.S.C. Title 18, Sec. 587) is not the statute which prescribed the substantive offenses charged in the indictment. However, Section 587 must be regarded as being as much a part of the statute (the Elkins Act) prescribing the offenses as if it were expressly written into the latter Act, because, but for this Section, the Government would have had no right whatever to seek the new indictment. Therefore Section 587 would necessarily appear to be a part of the statute upon which the indictment is founded, and it would do no violence to language to so consider it.

If the Elkins Act, which prescribed the offense charged, had contained in its own language a definite statute of limitations but had also directed that the limitation should be suspended under certain circumstances, which is the only effect of Section 587, there clearly could be no question but that a decision or judgment holding that the suspension of the limitation provision did not apply in certain circumstances would be a "decision or jud

ment * * * based upon the * * * construction of the statute upon which the indictment is founded."

E. The question presented is substantial. Section 587 is a statute of general application which was enacted for the purpose of circumventing the efforts of defendants to delay prosecution through resort to dilatory motions until the statute of limitations had barred re-indictment. (Report of Judiciary Committee, Congressional Document 9769, Senate Report 405, 73d Cong., 1st Sess.) The construction of the Act by the District Court interposes an interim of wholly unnecessary and illogical delay in the re-indictment of defendants under this Act, during which interim prosecution would become more difficult through the disappearance or death of witnesses, the vanishing of evidence, and the staleness of the crime, which always result from the passage of time. It is clearly of public importance that after an indictment is quashed the Government be permitted to seek a new indictment at the earliest possible opportunity consistent with the availability of a grand jury. There are no other court decisions on the question here presented, and it is highly important in the enforcement of Federal criminal statutes generally that the question be settled by the Supreme Court.

F. If the judgment of the District Court be regarded as one sustaining a special plea in bar, the

following decisions support the jurisdiction of the Supreme Court:

United States v. *Celestine*, 215 U. S. 278; *United States* v. *Barber*, 219 U. S. 72; *United States* v. *Oppenheimer*, 242 U. S. 85; *United States* v. *Thompson*, 251 U. S. 407.

If the judgment of the District Court quashing and setting aside the indictment was based upon that Court's construction of the statute upon which the indictment was founded, the following decisions sustain the jurisdiction of the Supreme Court:

United States v. *Keitel*, 211 U. S. 370; *United States* v. *Sprague*, 282 U. S. 716; *United States* v. *Hastings*, 296 U. S. 188; *United States* v. *Curtiss-Wright Corp.*, 299 U. S. 304.

A copy of the opinion of the District Court is appended hereto.

Respectfully submitted.

N. A. TOWNSEND,
Acting Solicitor General.
JOHN J. QUINN,
United States Attorney.

JULY 1938.

In the District Court of the United States for the District of New Jersey

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CRIMINAL No. 7918b

UNITED STATES OF AMERICA

v.

DURKEE FAMOUS FOODS, INC.

CRIMINAL No. 7919b

UNITED STATES OF AMERICA

v.

MANHATTAN LIGHTERAGE CORPORATION

CRIMINAL No. 7920b

UNITED STATES OF AMERICA

v.

COLGATE-PALMOLIVE-PEET COMPANY

(On defendants' pleas in bar to indictments.)

Newark, N. J., Tuesday, June 14, 1938

Before Hon. GUY L. FAKE, U. S. D. J.

Appearances: Daniel H. Kunkel, Esq., Special Assistant to the United States Attorney, for the Government. Roger Hinds, Esq., for defendant

Durkee Famous Foods, Inc. Frank M. Swacker, Esq., for defendant Manhattan Lighterage Corporation. Messrs. Wall, Haight, Carey & Hartpence, by John A. Hartpence, Esq. and Alfred F. Conway, Esq., for defendant Colgate-Palmolive-Peet Company.

W. W. HEIRONIMUS,
Official Reporter.

The COURT (orally, at close of argument): The issues here arise on three indictments, to each of which pleas in bar have been filed. This memorandum will be dispositive of the three cases.

The defendants were indicted on the 9th of April, 1937, for alleged violations of the Elkins Act, Title 49, Section 41.

The acts complained of in the indictments having been committed, according to the dates set forth therein, more than three years prior to the filing of the indictments, Section 582 of Title 18 of the U. S. Code provides as follows:

> No person shall be prosecuted, tried, or punished for any offense, not capital, except as provided in Section 584 of this Title, unless the indictment is found or action is instituted within three years next after such offense shall have been committed.

It is contended for the Government that the pleas should not be sustained because Section 587 of Title 18 of the U. S. Code provides as follows:

> Whenever an indictment is found defective or insufficient for any cause after the

> period prescribed and the applicable Statute of Limitations has expired, a new indictment may be returned at any time during the next succeeding term of Court following such finding, during which the Grand Jury thereof shall be in session.

It is urged that a reasonable and proper consideration of this section causes it to become effective as to the then existing term of Court, notwithstanding the fact that the statute itself is silent as to the then existing term. (Citing Endlich on Interpretation of Statutes, pages 559, etc., *U. S.* v. *N. Y. Central Railroad,* 212 U. S. 509; *U. S.* v. *Koenig Coal Co.,* 270 U. S. 512; *U. S.* v. *Baltimore Post Co.* 2 Fed. (2d) 761, affirmed 268 U. S. 388; *Ozawa* v. *U. S.,* 260 U. S. 178.)

Counsel for the defendants argue that to so construe the statute would cause the Court to enter the sphere of the legislature and in effect amend the Act to read as follows:

> A new indictment may be returned at any time during the next succeeding term of court, following such finding, during which the Grand Jury thereof shall be in session and *as well at the Term in which the indictment is found defective.*

Moreover, it is urged that Section 587 must be strictly construed because it is an exception to the Statute of Limitations.

Other arguments are offered by counsel for the defense, which appear in defendants' briefs. They

cite the following cases to sustain their position: *U. S.* v. *Shelton,* 2 Wheaton, 119–121 and 122. *U. S.* v. *McElvaine,* 272 U. S. 633 at 639; *U. S.* v. *Scherton,* 285 U. S. 518 at 521–2; 16 Corpus Juris, 228, Section 350.

The indictments were returned by a Grand Jury sitting for the January Term of Court on April 9, 1937, but within the time fixed by law for the April Term of Court at Newark, the January Term having been extended by an order of the Court.

At the time the previous indictments were quashed by this Court, the three-year Statute of Limitations had then run against the alleged offenses.

Newark, N. J., Monday, June 27, 1938

(Hearing continued from June 14, 1938. Same appearances.)

The COURT (Orally, at close of argument): At the last session, I stated the facts and raised the issues upon which counsel have appeared before me today. Both sides have been diligent in their endeavors to assist the Court in ascertaining the law to be followed here. No cases have been discovered bearing upon a construction of the section of the Statute of Limitations which is here involved. This has resulted in much research in an endeavor to find an analogous situation, and upon careful consideration of the arguments presented by counsel, as well as a consideration of the cases they have cited, it is my conclusion that the Court, being without power to

amend the statute involved, and it appearing that the statute itself contains no ambiguity, either patent or latent, must give to the statute the generally accepted meaning of the language used therein. This leads to the inescapable conclusion that where an indictment has been found to be defective after the passage of the prescribed period of limitation, the one and only Grand Jury which can hand down a new indictment is that Grand Jury which is authorized to act at the term next succeeding the term at which the Court found the indictment to be defective; and it appearing, as it does here, that the indictments under review were not found by a Grand Jury authorized as aforesaid, the indictments must necessarily fall.

The pleas in bar are therefore sustained.

United States District Court, District of New Jersey. *United States of America, Plaintiff,* v. *Durkee Famous Foods, Inc., a corporation, Defendant.* Criminal No. 7918b. Statement as to jurisdiction. John J. Quinn, United States Attorney. Filed July 25, 1938. At 11 o'clock A. M. Benjamin F. Harvey, Clerk.

U. S. GOVERNMENT PRINTING OFFICE: 1939